80-2095

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IN THE

Supreme Court of the United States

OCTOBER TERM 1980

No. .....

NEW YORK SHIPPING ASSOCIATION, INC., COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ATLANTIC COAST DISTRICT, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Petitioners,

v.

WILLIAM A. PASCARELL, Acting Regional Director of the Twenty-Second Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Questions Presented

This case presents for adjudication several significant questions, never previously decided by this Court, relating to the application of §10(l) of the National Labor Relations Act which, as Justice Harlan observed in an earlier case, "has not heretofore been passed upon by this Court and is of continuing importance in the proper administration of the Labor Act." Solicitor General's Pet. for Cert. at 12, *McLeod* v. *General Electric Co.*, 366 F.2d 847 (2d Cir. 1966), *vacated as moot*, 385 U.S. 533 (1967) (U.S. No. 66-645, filed Oct. 7, 1966). These questions are:

1. Whether the mere presentation by a Regional Director of the National Labor Relations Board of a theory of law that is not "frivolous and insubstantial" is a sufficient showing of "reasonable cause" mandating the issuance of an injunction under §10(l) of the National Labor Relations Act, even though the district court determines that the basic theory of law advanced by the Regional Director is erroneous?

2. Whether a finding of "reasonable cause" requires the automatic issuance of a 10(l) injunction without any separate and independent consideration by the district court of whether the requested injunctive relief is "just and proper"?

3. Whether the Third Circuit's rule, which requires a district court without any consideration of the equities to grant a 10(l) injunction merely upon a finding that the Regional Director's legal theory is not "frivolous and insubstantial," violates Article III of the Constitution of the United States by depriving the court of any adjudicatory function and delegating its judicial power to an organ of the executive branch?

4. Whether, in a case on remand to the National Labor Relations Board from a circuit court of appeals, the appellate court retains exclusive jurisdiction under §§ 10(e) and 10(f) of the National Labor Relations Act, foreclosing a district court's exercise of §10(l) jurisdiction?

Parties

In addition to petitioners and respondent, charging parties American Trucking Associations, Inc., International Association of Non-Vessel Operating Common Carriers and Twin Express, Inc. were granted leave to appear as amici curiae in the court of appeals. Corporate petitioner New York Shipping Association, Inc. has one subsidiary, Atlantic Cargo Inspection Bureau, Inc. None of the other petitioners has any parent corporation or subsidiary.

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IN THE

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No. .....

NEW YORK SHIPPING ASSOCIATION, INC., COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ATLANTIC COAST DISTRICT, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Petitioners,

v.

WILLIAM A. PASCARELL, Acting Regional Director of the Twenty-Second Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners New York Shipping Association, Inc. ("NYSA"), Council of North Atlantic Shipping Associations ("CONASA"), International Longshoremen's Association, AFL-CIO ("ILA") and Atlantic Coast District, International Longshoremen's Association, AFL-CIO respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

Opinions Below

The opinion of the court of appeals, not yet reported, is reproduced in the separately bound appendix to this petition (App. A at 1a-8a). The opinion of the United States District Court for the District of New Jersey, which was rendered orally from the bench on February 23, 1981, is not reported. The district court's opinion is also reproduced in the appendix (App. C at 19a-20a, 21a, 24a, 33a-36a, 39a-40a, 47a, 55a, 79a, 84a-91a, 121a-127a, 131a-132a, 135a-136a, 138a, 141a-142a, 157a-158a, 160a-162a, 163a, 164a-166a, 169a, 170a-171a, 176a-192a, 198a, 202a).[1]

Jurisdiction

The judgment of the court of appeals (App. B at 9a-10a) was entered on May 20, 1981. This petition is filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Statutes Involved

The relevant constitutional and statutory provisions are U.S. Const., art. III, §1 and §10(l) of the National Labor Relations Act (NLRA), 29 U.S.C. §160(l). The text of these provisions is set forth verbatim in the separately bound appendix (App. D at 207a-208a).

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[1] Since the district court's reasoning was expressed at different stages of the proceedings held on January 5, January 12 and February 23, 1981, Appendix C contains the entire transcript of these proceedings. The citations in the text to Appendix C refer to statements of the district court which may properly be considered part of its opinion.

Statement of the Case

Nature of the Case

This case involves a special statutory proceeding under NLRA §10(l) for a preliminary injunction prohibiting the implementation of collectively bargained work rules, known as the Rules on Containers, pending adjudication by the National Labor Relations Board ("NLRB" or "Board") of their legality under federal labor law.

The Rules are the negotiated response of the ILA and the multi-employer associations in the shipping industry, including NYSA and CONASA, to the technological displacement of longshore work occasioned by the shipping employers' increasing use of automated cargo handling techniques, known as containerization. All the relevant facts in this case have already been definitively established in the opinions of this Court and the District of Columbia Circuit in *NLRB* v. *International Longshoremen's Association ("ILA")*, 447 U.S. 490 (1980), *aff'g* 198 U.S. App. D.C. 157, 613 F.2d 890 (1979). These facts will not be repeated.

History of Litigation

This case arose in the wake of the *ILA* decision by this Court which overturned a series of prior erroneous NLRB determinations that the Rules on Containers were a hot cargo agreement violating NLRA §8(e), 29 U.S.C. §158(e), and that their implementation contravened the secondary boycott proscriptions of NLRA §8(b)(4), 29 U.S.C. §158(b)(4).[2] The Court remanded *ILA* to the Board for recon-

[2] Since 1973, implementation of the Rules on Containers, which were adopted in 1969 with the assistance of a presidential mediator, has been restrained by court decrees. *See, e.g., Int'l Longshoremen's Ass'n* v. *NLRB*, 537 F.2d 706 (2d Cir. 1976), *cert denied*, 429 U.S. 1041 (1977), *vacated and remanded*, No. 75-4266 (2d Cir. 1980) (cease and desist order on the merits); *Hirsch* v. *Int'l Long-*

sideration guided by "a proper understanding of the work at issue." 447 U.S. at 511.[3]

Counsel for petitioners urged the Board's General Counsel to establish a procedure which would facilitate an expedited final determination by the NLRB of the remanded cases. Any undue delay threatened to upset the delicate labor stability in the industry. Indeed, in his petition for

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shoremen's Ass'n Local 1242, No. 79-2022 (E.D. Pa. 1979), *petition to dissolve injunction denied*, No. 79-2022 (E.D. Pa. 1980) (10(l) injunction in Philadelphia); *Boire* v. *Int'l Longshoremen's Ass'n Local 1408*, No. 77-925 (M.D. Fla. 1977) (10(l) injunction in Jacksonville); *Humphrey* v. *Int'l Longshoremen's Ass'n*, No. Y-75-1395 (D. Md. 1976) (10(l) injunction in Baltimore); *Humphrey* v. *Int'l Longshoremen's Ass'n*, 401 F. Supp. 1401 (E.D. Va. 1975), *rev'd*, 548 F.2d 494 (4th Cir. 1977) (10(l) injunction in Hampton Roads); *Balicer* v. *Int'l Longshoremen's Ass'n*, 364 F. Supp. 205 (D. N.J.), *aff'd mem.*, 491 F.2d 748 (3d Cir. 1973) and *Balicer* v. *Int'l Longshoremen's Ass'n*, 86 L.R.R.M. 2559 (D. N.J. 1974) (10(l) injunctions in New York). However, several 10(l) petitions to enjoin enforcement of the Rules were denied. *Boire* v. *Int'l Longshoremen's Ass'n Local 1416*, No. 79-33-Civ. (S.D. Fla. 1979) (Miami); *Danielson* v. *Int'l Longshoremen's Ass'n*, No. 75 Civ. 4027 (S.D.N.Y. 1975) (New York).

[3] On October 1, 1980 the Second Circuit recalled its injunctive mandate and remanded for reexamination the seminal *Conex I* case in which the Board first invalidated the Rules on Containers. *Int'l Longshoremen's Ass'n* v. *NLRB*, No. 75-4266 (2d Cir. 1980), *recalling and remanding* 537 F.2d 706 (2d Cir. 1976), *enforcing Int'l Longshoremen's Ass'n (Consolidated Express, Inc.)*, 221 N.L.R.B. 956 (1975). The Fourth and Fifth Circuits reached the same result in other related cases. *Int'l Longshoremen's Ass'n* v. *NLRB*, No. 79-1672 (4th Cir. 1980), *remanding Int'l Longshoremen's Ass'n (Beck Arabia, Ltd.)*, 245 N.L.R.B. No. 172 (1979) and *Int'l Longshoremen's Ass'n Local 1408* v. *NLRB*, No. 79-3444 (5th Cir. 1980), *remanding Int'l Longshoremen's Ass'n Local 1408 (Puerto Rico Marine Management, Inc.)*, 245 N.L.R.B. No. 171 (1979). The Board also decided to reconsider three other related proceedings which were pending at various adjudicatory stages. *Int'l Longshoremen's Ass'n (The Terminal Corp.)*, NLRB Nos. 5-CC-925, 929; *Int'l Longshoremen's Ass'n Local 1416 (Custom Brokers & Forwarders Ass'n of Miami)*, NLRB No. 12-CE-30; and *Int'l Longshoremen's Ass'n Local 1242 (Hill Creek Farms, Inc.)*, NLRB Nos. 4-CC-1133 and 4-CE-55.

certiorari in *ILA*, the Solicitor General of the United States, on behalf of the NLRB, had recognized that "unless the uncertainty as to the validity of the Rules on Containers . . . is speedily resolved there is great danger that these negotiations will, as they have in the past, result in industrial strife over the containerization question." NLRB Pet. for Cert. at 17, *ILA, supra* (U.S. No. 79-1081, filed Jan. 10, 1980).[4]

This Proceeding

In view of the delay encountered in the pending NLRB cases,[5] petitioners on December 6, 1980 entered into an agreement providing for the implementation of the Rules on Containers effective January 1, 1981. Charges were then filed and a complaint issued initiating the NLRB unfair labor practice proceeding underlying this case.[6] This 10(l) case then ensued.

The District Court's Decisions

At the outset of this litigation, the district court denied the Regional Director's application for a temporary restraining order (App. C at 91a). District Judge Herbert J. Stern concluded that prior decisions by the Third Circuit relating to the standards to be applied in 10(l) proceedings were not applicable in this extraordinary case

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[4] The current 1980-1983 national longshore labor contract was peacefully and quickly negotiated in the wake of this Court's decision in *ILA*. However, the contract contains a provision that it can be reopened after December 1, 1981.

[5] It was not until the application for a temporary restraining order was denied in this case that the NLRB finally consolidated all the pending cases and assigned them to a single administrative law judge.

[6] Since the complaint is virtually identical to those in pending cases challenging the same Rules on Containers, the NLRB, upon petitioners' motion, ordered the complaint transferred directly to it for adjudication, and then consolidated it with the pending cases.

(App. C at 88a). In his view, the equities did not warrant the issuance of a restraining order.

The district judge indicated that he was also inclined to deny the requested 10(l) injunction (App. C at 92a). He urged the parties to agree to convert the unappealable denial of the temporary restraining order into an order denying the 10(l) injunction to facilitate an immediate appeal (App. C at 93a, 98a, 102a). When this did not materialize, the court decided to render a formal adjudication on the 10(l) application.

Ten days before the hearing, the Third Circuit rendered a decision in a related labor/antitrust case involving the Rules on Containers. *Consolidated Express, Inc.* v. *New York Shipping Association ("Conex II")*, 641 F.2d 90 (3d Cir. 1981), *mandamus and prohibition denied sub nom. In re International Longshoremen's Association*, 49 U.S. L.W. 3789 (U.S. Apr. 20, 1981) (No. 80-1414). In the course of its opinion, the court of appeals took note of the §10(l) proceeding in this case. 641 F.2d at 94. It went out of its way to state its views on §10(l), although that was not an issue in the case before it.

> [W]e have interpreted section 10(l) as ancillary to the main unfair labor practice proceeding and have confined the district court in a section 10(l) to determining that the General Counsel has reasonable cause to believe that the elements of an unfair labor practice are present and that the legal theory on which he proceeds is substantial and not frivolous.

Id. at 95.

On February 23, 1981, the district court ruled reluctantly that it was compelled to issue the 10(l) injunction in this case. Referring to the Third Circuit's *dictum* in *Conex II*, the district court said:

> As I read it, a clue has been given to us as to what to do with this 10(l) application. I might say that after that opinion came down a lot of our thinking had to be rethunk and our writing had to be rewrote. And I have a very elaborate thing to say here. But before I say it, I think maybe I ought to give counsel an opportunity to address that opinion, because it seems to me the Circuit is saying that I should grant a 10(l) in this case.

(App. C at 157a-158a).

Although the district court expressly disagreed with what it believed to be the rule in the Third Circuit, it nonetheless considered itself bound by the rule that it must automatically issue a 10(l) injunction if it finds that the Regional Director's theory is not "frivolous and insubstantial," even though an independent determination of the equities would establish that the injunction was not "just and proper" (App. C at 183a-189a). The district court granted the injunction without considering the equities (App. C at 188a-190a).

The Decision of the Court of Appeals

The court of appeals affirmed. The appellate panel which decided the case upheld the district court's exercise of 10(l) jurisdiction despite the previous adjudication on the merits and remand to the Board by both this Court and the District of Columbia Circuit in *ILA*. The panel also reaffirmed the Third Circuit's rule that a 10(l) injunction is warranted if "the Board's legal theory is substantial and not frivolous" (App. A at 7a).

In rather oblique fashion, the court of appeals panel confirmed the district court's perception that the rule prevailing in the Third Circuit prohibited any consideration of the equities under the "just and proper" standard of

NLRA §10(l). However, the panel paid lip service to the "just and proper" test. It suggested that the injunction in this case served to preserve the status quo which it defined as the period 1973 through 1980, when "the Rules on Containers were inoperative" (App. A at 7a). Its definition, however, was at odds with the district court's finding that this putative "status quo" was artificially created by court decrees enjoining implementation of the Rules (App. C at 35a, 88a, 95a, 190a). Those prior injunctions were premised on what this Court in *ILA* ultimately held to be an erroneous legal theory.[7]

Reasons for Granting the Writ

A. *Conflict in the Circuits*

NLRA §10(l) prescribes two standards which must be met before a preliminary injunction may be granted:

> (1) The petitioner must have "reasonable cause to believe" that the unfair labor practice charge is true; and
>
> (2) The district court may grant such injunctive relief "as it deems just and proper."

29 U.S.C. §160(l).

The 10(l) test formulated by the Third Circuit requires the district court to find "reasonable cause" whenever the Regional Director's legal theory is not "frivolous and insubstantial," even if the district court concludes that the theory is erroneous. In the Third Circuit's view, the is-

[7] The Third Circuit panel also gratuitously assumed that implementation of the Rules would drive consolidators out of business (App. A at 6a, 8a). The district court, however, had prescinded from any consideration of the equities and thus had declined to make any findings with respect to this disputed factual allegation (App. C at 188a-190a).

suance of a 10(l) injunction is automatically "just and proper" if its version of "reasonable cause" exists. The Third Circuit's decision in this case is in direct and irreconcilable conflict with the decisions of other circuits with respect to both aspects of the statute.

A fourway split in the circuits has developed. The Fifth, Seventh, Eighth and Ninth Circuits have endorsed the "frivolous and insubstantial" test although the Fifth Circuit may have recently signalled its departure from the test. While the First Circuit has adopted only the "insubstantial prong" of the test, the Second and Fourth Circuits have rejected the test entirely. The Sixth and Tenth Circuits, on the other hand, have not formulated any test, preferring instead the literal language of the statute. None of the other circuits, however, has embraced the Third Circuit's interpretation of the "just and proper" standard.

1. Reasonable Cause

The Second and Fourth Circuits have expressly ruled that a district court should not grant the requested 10(l) injunction if it is convinced that the Regional Director's legal theory—albeit not "frivolous or insubstantial"—is nonetheless wrong as a matter of law. *Danielson* v. *Joint Board of Coat, Suit & Allied Garment Workers,* 494 F.2d 1230, 1239-45 (2d Cir. 1974); *Humphrey* v. *International Longshoremen's Association,* 548 F.2d 494, 497-98 (4th Cir. 1977); *see also Kaynard* v. *Palby Lingerie, Inc.,* 625 F.2d 1047, 1051 (2d Cir. 1980) (analogous NLRA §10(j) proceeding). These two ciricuits have concluded that application of the "frivolous and insubstantial" standard would amount to an improper abdication of judicial function tantamount to converting the district court into a "rubber stamp." *Danielson,* 494 F.2d at 1239, 1243-44. In the view of the Second and Fourth Circuits, the Regional

Director must, at the very least, establish a reasonable likelihood that his theory will be approved by the Board and ultimately enforced by a circuit court on review. *Humphrey*, 548 F.2d at 498.[8]

In a series of decisions culminating with the one for which review is now sought, the Third Circuit formulated the rule that a district court must passively defer to the Regional Director's legal theory as long as it is not "frivolous and insubstantial". *Conex II, supra; Hirsch* v. *Building & Construction Trades Council*, 530 F.2d 298 (3d Cir. 1976); *Samoff* v. *Building & Construction Trades Council*, 475 F.2d 203 (3d Cir.), *vacated and remanded as moot*, 414 U.S. 808 (1973); *Schauffler* v. *Local 1291, International Longshoremen's Association*, 292 F.2d 182 (3d Cir. 1961). Other circuits have followed suit. *See, e.g., Boire* v. *International Brotherhood of Teamsters*, 479 F.2d 778, 789 (5th Cir. 1973); *Squillacote* v. *Graphic Arts International Union*, 540 F.2d 853 (7th Cir. 1976); *Hendrix* v. *Operating Engineers Local 571*, 592 F.2d 437, 442 (8th Cir. 1979); *Kennedy* v. *Los Angeles Typographical Union*, 418 F.2d 6, 8 (9th Cir. 1969).[9] The First Circuit has adopted only the "insubstantial" prong of the "frivolous and insubstan-

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[8] The Fourth Circuit's rejection of the "frivolous and insubstantial" standard in *Humphrey* occurred in a related §10(l) case involving the same labor law challenge to the same Rules on Containers at issue in this case. *Humphrey* may have heralded a trend in the circuits favoring departure from this standard. In *Baldovin* v. *Int'l Longshoremen's Ass'n*, 626 F.2d 445, 454 (5th Cir. 1980), the Fifth Circuit, which had previously endorsed the "frivolous and insubstantial" standard, refused to issue a 10(l) injunction based upon a legal theory it found to be erroneous.

[9] Neither the District of Columbia Circuit nor the Sixth or Tenth Circuit has become embroiled in this conflict. The District of Columbia Circuit has never decided a §10(l) case; the latter two circuits have merely applied the literal language of the statute without elaboration. *See, e.g., Angle* v. *Sacks*, 382 F.2d 655 (10th Cir. 1967); *AFTRA* v. *Getreu*, 258 F.2d 698 (6th Cir. 1958).

tial" standard. *Union De Tronquistas Local 901* v. *Arlook*, 586 F.2d 872 (1st Cir. 1978) (Regional Director's legal theory must be accepted if "not without substance").

Thus there exists a four-way split among the circuits as to the standard to be applied to a Regional Director's legal theory under NLRA §10(l)—a divergence that can be reconciled only by this Court.

2. Just and Proper

All the circuits agree that, in addition to the reasonable cause standard, the "just and proper" language of §10(l) establishes a separate and distinct test that must be independently satisfied before injunctive relief may issue.[10]

The words "just and proper" represent a congressional embodiment of the traditional considerations that a court takes into account in entertaining an application for equitable relief. These considerations include: (1) a showing of irreparable injury pendente lite, (2) a balancing of the equities or comparative harm among interested persons, (3) the maintenance of the status quo, and (4) the protection of the public interest. *Sampson* v. *Murray*, 415 U.S. 61, 84-92 (1974); *Brown* v. *Chote*, 411 U.S. 452, 456 (1973). The other traditional equitable factor, likelihood of ultimate success on the merits, is of course subsumed in the "reasonable cause" standard of §10(l).

These traditional equitable principles, universally invoked by federal courts in preliminary injunction applications under Fed. R. Civ. P. 65, have been applied by those circuits which have specifically addressed the question

[10] *Union De Tronquistas*, 586 F.2d at 876, 877-78; *Kaynard* v. *Local 282, Teamsters*, 576 F.2d 471, 477 (2d Cir. 1978); *Danielson*, 494 F.2d at 1242; *Boire*, 479 F.2d at 787; *Hendrix*, 592 F.2d at 443; *Kennedy*, 418 F.2d at 8.

whether a §10(l) injunction is just and proper. *Danielson* v. *IBEW Local 501*, 509 F.2d 1371, 1375 (2d Cir. 1975) (delay); *Boire*, 479 F.2d at 788-89 (status quo, irreparable harm, balancing of equities, public interest); *Squillacote*, 540 F.2d at 859 (balancing of equities); *Hendrix*, 592 F.2d at 443 (usual discretionary equitable considerations).[11] It had seemed that the Third Circuit in *Schauffler* had previously agreed with its sister circuits.

> It was only necessary to determine whether the Director had reasonable cause to believe that the charges filed were true. The court must, of course, *also* find, as it did find, that its granting of equitable relief was 'just and proper.'

292 F.2d at 186, n.4 (emphasis supplied).

In its latest decisions, however, the Third Circuit has departed from the prevailing rule. It has directed its district courts to disregard equitable considerations in the §10(l) setting.[12] In this case, it has in effect ruled that if the district court finds "reasonable cause," the issuance of the injunction is automatically "just and proper." In the Third Circuit's view, once there has been a minimal factual showing and the district court has determined that it cannot say that the Regional Director's legal theory is

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[11] In an earlier 10(l) proceeding involving the Rules on Containers, Judge Lacey of the District of New Jersey considered the equitable factors of irreparable harm, balancing of the equities and the public interest in adjudicating the propriety of injunctive relief under the "just and proper" standard. *Balicer*, *supra*, 364 F. Supp. at 227.

[12] The only circumstance where the decision below would give effect to the "just and proper" clause—"when there was no actual threat that the unfair labor practice charged before the Board was likely to continue pendente lite" (App. A at 8a)—is a meaningless exception. If the challenged conduct has ceased and there is no threat that it is likely to resume, the 10(l) application becomes moot.

frivolous or insubstantial, an injunction must issue as a matter of course. This was the scenario expressly followed by the district court in this case. This was what the Third Circuit affirmed.

There exists then wide judicial disagreement among the circuits in formulating and applying the standards of §10(l), a statute of nationwide application. Review by this Court is necessary to resolve the conflict.

B. *Constitutional Question*

The judicial power of the United States is vested in this Court and in inferior courts established by Congress. U.S. CONST., art. III, §1. That power may not be vested in, nor shared by, other branches of government. *United States* v. *Nixon*, 418 U.S. 683, 704 (1974); *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803). The NLRB is not a court established by Congress, but an administrative agency within the executive branch, which is powerless to grant judicial relief. *NLRB* v. *Riverside Mfg. Co.*, 119 F.2d 302 (5th Cir. 1941).

Adjudicative actions by administrative agencies are constitutionally permissible only if at some point they undergo review by a court of law. *Yakus* v. *United States*, 321 U.S. 414, 429, 434 (1944); *accord*, *McLean Trucking Co.* v. *OSHRC*, 503 F.2d 8, 11 (4th Cir. 1974). Absent judicial review, there is an unconstitutional delegation of the judiciary's Article III powers.[13]

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[13] This Court has also recognized that, in the granting of injunctive relief, a court retains its traditional equitable powers, even if the statute does not contain the "just and proper" language or any other expression of equitable discretion. *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329-30 (1940); *Potter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946). Until recently it seemed that the Third Circuit agreed. *See Hodgson* v. *Carpenters Local 2212*, 457 F.2d 1364, 1368 (3d Cir. 1972).

The rule formulated by the Third Circuit in this case dilutes the power of a federal court in a §10(l) proceeding to a degree that effectively vitiates any judicial review. The district court has no fact-finding role; it must resolve all disputed issues in favor of the Regional Director. The court has no judicial role; it must accept the Regional Director's legal theory, no matter how clearly erroneous it may seem, if it is within the realm of rationality. The court has no equitable role; having found "reasonable cause," it must issue injunctive relief without inquiry into its justice or propriety.

The Third Circuit would strip from the district court and entrust—not to the NLRB but to the agency's staff—the real judicial function. As the district judge painfully recognized in this case (App. C at 33a-36a, 47a, 202a), the court is reduced to a mere functionary of the agency, foreordained to grant relief which only a court can give—an injunction backed with the sanction of contempt.

Petitioners believe that the Third Circuit's rule is repugnant to Article III of the Constitution of the United States.[14] Review by this Court, the final arbiter of the Constitution, *Pennekamp* v. *Florida*, 328 U.S. 331, 335 (1946), of the §10(l) standards formulated by the Third Circuit is needed to rectify the unconstitutional abdication of a federal court's Article III powers.

C. *Novel Jurisdictional Issue*

This case also presents for adjudication the novel and important issue of a district court's jurisdiction to entertain a 10(l) application in an NLRB case on remand from

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[14] Where this occurs in an injunction proceeding, which may well be dispositive of the entire controversy, the contravention of Article III may also give rise to an infringement of due process. *See* note 16 *infra* and accompanying text.

a court of appeals. Section 10(l), which establishes a limited exception to the jurisdictional proscriptions of the Norris-LaGuardia Act, 29 U.S.C. §101, *et seq.*, permits a federal district court to issue a preliminary injunction at the outset of certain NLRB unfair labor practice cases. Once the Board has adjudicated the charge, the district court's NLRA §10(l) jurisdiction ceases, and any relief it has granted expires. *Sears, Roebuck & Co.* v. *Carpet Layers Local 419*, 397 U.S. 655, 658-59 (1970). Thereafter judicial power to entertain the controversy falls within the *exclusive* jurisdiction of an appropriate court of appeals under NLRA §§10(e) and 10(f), 29 U.S.C. §§160(e) and 160(f). The appellate court is empowered not only to review the merits of the Board's determination, but also "to grant such temporary relief or restraining order as it deems just and proper." 29 U.S.C. §§160(e) and 160(f).

The Third Circuit facilely upheld the district court's exercise of 10(l) jurisdiction in this case over a controversy on remand to the Board after adjudications on the merits by both this Court and several circuit courts (App. A at 6a-7a). While conceding the jurisdiction of the remanding courts of appeals to grant the requested injunctive relief (App. A at 7a), the Third Circuit, despite the clear and unambiguous language of NLRA §§10(e) and 10(f), refused to accept the *exclusive* nature of this appellate jurisdiction. Instead, it found concurrent 10(l) jurisdiction in the district courts (App. A at 7a).

The Third Circuit's holding directly conflicts with the only other authority on point. *Great Western Broadcasting Corp.* v. *Hoffman*, 214 F. Supp. 173 (N.D. Cal. 1963). Moreover, the ruling of the court of appeals in this case is at odds with the Second Circuit's denial of the Board's request in *Conex I* to keep its cease and desist order in effect pending the NLRB's reconsidera-

tion of the legality of the Rules on Containers pursuant to this Court's remand in *ILA*. The Third Circuit's ruling therefore leads to the anomalous result that the Board was able to obtain from the district court under the lesser 10(l) standard the very relief which this Court and the District of Columbia Circuit in *ILA* and the Second Circuit in *Conex I* had expressly withheld on the merits.

A district court is divested of §10(l) jurisdiction when a controversy has been presented to an appellate court. Review of this novel and exceptional issue will enable this Court to define the precise contours of the jurisdictional provinces of district and circuit courts within the NLRA's statutory scheme.

D. *Recurring Issues of National Scope and Importance*

The multiple conflicts among the circuits in the interpretation of NLRA §10(l) have never been resolved by this Court despite several grants of certiorari in 10(l) cases. *See, e.g., Samoff* v. *Building and Construction Trades Council*, 475 F.2d 203 (3d Cir.), *vacated and remanded as moot*, 414 U.S. 808 (1973); *McLeod* v. *General Electric Co.*, 366 F.2d 847 (2d Cir. 1966), *vacated as moot*, 385 U.S. 533 (1967) (related §10(j) case). Justice Harlan, in granting a stay of the appellate court's judgment in *McLeod*, observed that the interpretation of the NLRA provisions authorizing preliminary injunctions "has not heretofore been passed upon by this Court and is of continuing importance in the proper administration of the Labor Act." Solicitor General's Pet. for Cert. at 12, *McLeod, supra* (U.S. No. 66-645, filed Oct. 7, 1966).

This Court's efforts to settle these important issues have been thwarted in the past. This case, however, provides an excellent opportunity for a definitive ruling by the Court. Since the underlying NLRB proceeding will not be de-

cided for several years (App. C at 170a, 175a), it is unlikely that this 10(l) case will become moot.

The significant issues in this case frequently recur. In the most recent five-year period, ending September 30, 1979, for which statistics are available, an average of almost 250 petitions for NLRA preliminary injunctions were filed annually. *See* 40-44 NLRB ANN. REPS. In this sensitive area, which reaches into every corner of the nation's economic life, "plainly the Board and the courts need to know what the correct standard is." Solicitor General's Pet. for Cert. at 12, *McLeod, supra* (U.S. No. 66-645, filed Oct. 7, 1966).[15]

The Third Circuit's rule, which effectively forecloses judicial participation for all practical purposes, deprives 10(l) respondents of their day in court on what may be the most important aspect of the labor controversy.[16] While two circuits have rejected the Third Circuit's formulation, four others have adopted a similar rule.[17] A defini-

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[15] A ruling by this Court on §10(l) would also have a material bearing on the proper interpretation of its companion §10(j), 29 U.S.C. §160(j), and provide guidelines for the application of other federal statutes which authorize temporary injunctions at the behest of an administrative agency or officer. *See* App. E at 209a-213a.

[16] This Court has recognized that a decision on a temporary injunction may be tantamount to a final disposition of the entire labor controversy.

> The truth is that authorizing the issuance of a temporary injunction, as is frequently true of temporary injunctions in labor disputes, may effectively dispose of petitioner's rights and render entirely illusory his right to review here as well as his right to a hearing before the Labor Board.

Local 438, General Laborers v. *Curry*, 371 U.S. 542, 550 (1963); *cf., Buffalo Forge Co.* v. *United Steelworkers*, 428 U.S. 397, 412 (1976).

[17] A pronouncement by this Court then would have the additional salutary effect of discouraging forum shopping by the NLRB.

tive statement by this Court, which would insure a correct and uniform interpretation of the oft-invoked NLRA §10(l), is necessary to effectuate the congressional policy favoring uniform application of national labor law. *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 242 (1959); *Garner* v. *Teamsters Local 776*, 346 U.S. 485, 490 (1953).

See generally Liquor Salesmen's Local 2 v. *NLRB*, —— F.2d ——, 106 L.R.R.M. 2953, 2956-57 (D.C. Cir. 1981); *see also Insurance Workers* v. *NLRB*, 124 U.S. App. D.C. 8, 360 F.2d 823 (1966). In this case, a §10(l) proceeding to enjoin implementation of the Rules on Containers could have been brought in any jurisdiction on the East and Gulf Coasts. The Board selected the Third Circuit to take advantage of its more lenient standard.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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Respectfully submitted,

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